No. 03-201

Supreme Court, U.S.
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In The

Supreme Court of the United States

CLAYTON HOSPITALITY GROUP, INC.,

Petitioner,

v.

ORANGE COUNTY, a political subdivision of the STATE OF FLORIDA, and EARL K. WOOD, in his official capacity as Orange County Tax Collector,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Clayton Hospitality Group, Inc., has abandoned the constitutional challenge based upon prompt judicial review because it was not specifically raised in the *Amended Complaint* and, contrary to Clayton Hospitality's references to a *First Amended Complaint*, there was no such document in the record before the District Court?

2. Alternatively, in the event the issue was properly preserved, whether the Eleventh Circuit properly upheld the facial constitutionality of the license transfer provision in *Orange County's Adult Entertainment Code* (AEC) because the AEC assures prompt judicial review by allowing access to prompt judicial review?

PARTIES TO THE PROCEEDING

As listed by Petitioner, Clayton Hospitality Group, Inc., d/b/a Diamond Club, the Respondents are Orange County, a political subdivision of the State of Florida, and Earl K. Wood, in his official capacity as Orange County Tax Collector. Orange County and the Orange County Tax Collector are separate and distinct governmental entities.

RULE 29.6 STATEMENT

Orange County, a political subdivision of the State of Florida, and Earl K. Wood, in his official capacity as Orange County Tax Collector, are governmental entities.

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STATEMENT OF THE CASE

Orange County ("County") and Earl K. Wood, as Orange County Tax Collector ("Tax Collector"), hereinafter jointly referred to as Respondents, incorporate by reference the procedural background and statement of the facts in the opinion of the Eleventh Circuit. (Pet. App. 2a to 8a)

The following misstatements of facts in the Petition are addressed below.

Respondents disagree with the statement on page vii of the Petition limiting the pertinent sections of the *Orange County Adult Entertainment Code* to only four sections. The courts below reviewed Chapter 3 of the *Orange County Code*, known as the *Orange County Adult Entertainment Code* ("AEC"), in its entirety. In fact, the orders entered below referenced Sections 3-9, 3-10, 3-19, 3-26, 3-27, 3-28, and 3-33 of the AEC. Further, the *Orange County Code* contains a general severability clause, codified in Section 1-11, that could be employed to sever any unconstitutional portion of the AEC, if appropriate.

The license transfer provisions of the AEC were the subject of this facial challenge. Clayton Hospitality Group, Inc. d/b/a "Diamond Club" ("Clayton Hospitality") attempts to summarize the procedure under the AEC for processing applications for the transfer of existing adult entertainment licenses. (Pet. 1) Clayton Hospitality's loosely-worded summary is inaccurate in that it does not precisely reiterate the applicable provisions of the AEC. For example, Clayton Hospitality asserts that each of the departments reviewing a license transfer application make a "*recommendation* to the Tax Collector." (Pet. 1) Actually, Section 3-28(c) of the AEC states that "[a]t the conclusion of its investigation, each department shall prepare a *report or memorandum*

and forward such report or memorandum to the tax collector. . . . "

Further, Respondents disagree with the statement by Clayton Hospitality that the Tax Collector does whatever the departments "recommend" without exception. (Pet. 1, n.2). As stated in Section 3-29(b) of the AEC, if the Tax Collector does not receive a report from a reviewing department within the 30-day period after the filing of an application, the Tax Collector is required to grant the application if no adverse findings from any of the other reviewing departments were reported within those 30 days.

Clayton Hospitality claims that "the applicant has 30 days to file a petition for review in the circuit court of Orange County." (Pet. 2) The AEC does not limit the aggrieved party to a petition for review in the state circuit court, but allows the aggrieved party to file an appropriate pleading, including a complaint for injunctive or declaratory relief, in *any* court of competent jurisdiction. Section 3-10 of the AEC provides that "[a]ny decision of the tax collector . . . may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." (Pet. App. 27a)

Clayton Hospitality makes a legal argument regarding the jurisdiction of the circuit courts. (Pet. 2, n.3) Respondents disagree with the inference that decisions of the Tax Collector related to applications for a transfer of an adult entertainment license must be reviewed in the same manner as quasi-judicial decisions of administrative agencies. Such decisions are quasi-executive decisions, not quasi-judicial decisions.

Clayton Hospitality claims that there is no time limit within which the circuit court must render a decision. (Pet. 2) The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature" and "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1 (2003). *See also*, Fla. R. Civ. P. 1.010 (2003). To effectuate the speedy determination of an action, the Rules of Civil Procedure provide a method for seeking a preliminary injunction (Fed. R. Civ. P. 65), a process for the prompt preparation of a case management report (Local Rule 3.05), and the entry of a Case Management Order with a trial date (Local Rule 3.05). In other words, the time frame within which a court must render a decision is governed in part by the Case Management Report prepared by the parties.

Respondents take issue with the claim that Clayton Hospitality vigorously disputed the violations. The undisputed facts show otherwise. According to the undisputed facts, on August 7, 2001, Gerald Uranick, the President of Clayton Hospitality, filed an application on behalf of Clayton Hospitality with the Occupational License Department of the Orange County Tax Collector for a transfer of the adult entertainment license for the Diamond Club from the existing license holder, InnCon America, Inc.

In accordance with Section 3-28(a) of the AEC, the Occupational License Department promptly sent copies of the transfer application to the several reviewing departments, those being the Orange County Sheriff, the building division, the fire and rescue services department, the health department, and the zoning division. Within 30 days of the filing of the transfer application, the zoning

division, the fire and rescue services department, and the sheriff reported to the Occupational License Department that they had not found any violations or other information that would require the denial of the application for a transfer of the Diamond Club adult entertainment license. (The health department did not submit a report.)

However, before the expiration of the same 30-day period, on August 22, 2001, after coordinating a date and time for the inspection with the owner or applicant, building division inspectors conducted an inspection of the Diamond Club and found several violations of the building code. During the inspection, the inspectors gave notice of building, electrical, and plumbing violations as specified in the Inspection Notices. The code violations included faulty stairway construction inside the establishment, and exterior lighting in damp locations, which lighting was not marked for use in wet locations. An excerpt from the building code detailing the requirements for stairway construction was delivered by the building division along with the Inspection Notices to Mr. Uranick by facsimile on August 30, 2001. By letter dated September 6, 2001, the Tax Collector, by and through the Occupational License Department, therefore notified Mr. Uranick of the denial of his application for a transfer of the adult entertainment license for the Diamond Club.

On October 30, 2001, the then current holder of the Diamond Club adult entertainment license, InnCon America, Inc., filed an application for a *renewal* of the existing adult entertainment license pursuant to Section 3-30(c) of the AEC. According to InnCon's application, Mr. Uranick had the "right or authority to manage or control the day-to-day operation of the establishment." That same day, October 30, 2001, the Tax Collector, by and through

the Occupational License Department, approved InnCon's application and renewed InnCon's adult entertainment license.

On or about October 30, 2001, Clayton Hospitality filed a Complaint against Orange County and Earl K. Wood, as Orange County Tax Collector.

Also on October 30, 2001, pursuant to Section 3-29(d) of the AEC, Clayton Hospitality filed a *second* application for a transfer of the existing adult entertainment license for the Diamond Club. Included with Clayton Hospitality's second application was a revised floor plan dated October 25, 2001. This revised floor plan had been modified from the floor plan that was filed with the initial transfer application to show a pool table and vending machines, thereby reducing the open floor space.

After coordinating with the applicant, the building division conducted another inspection on November 8, 2001. The building division determined, based upon its review of the revised floor plan and inspection, that the occupant load for the establishment would be under 100 and, therefore, the stairs that had previously been found in violation due to the Group A assembly nature of the Diamond Club now complied with Section 1019.9 of the *Standard Building Code* pertaining to stairway construction. However, the inspectors noted that the violation of *National Electrical Code*, Section 410-4(6), which requires exterior lighting fixtures in wet locations to be marked "Suitable for Wet Locations," still existed. The building division noted a second violation due to a raised floor area which appeared to have been constructed without a building permit.

This time, after receiving the inspection notices, Clayton Hospitality addressed the building code violations within the 30-day period that began on the date Clayton Hospitality had filed the second transfer application. Because the violations were resolved within the 30-day period, the building division notified the Occupational License Department prior to the expiration of the 30-day period that the applicant had corrected the building code violations. Accordingly, by letter dated November 28, 2001, the Tax Collector, by and through the Occupational License Department, *granted* the second application for a transfer of the existing adult entertainment license to Plaintiff.

Nevertheless, on January 29, 2002, Clayton Hospitality filed an Amended Complaint. In its Amended Complaint, it dropped the "as applied" challenge and dropped the specific argument that the AEC did not provide for prompt judicial review.

Clayton Hospitality claims that it properly asserted or reserved the prompt judicial review argument below. However, Respondents object to the inclusion of the prompt judicial review issue because the issue was not included in the Amended Complaint served on the County or the Tax Collector, and, based upon Respondents' records, Clayton Hospitality never filed a *First* Amended Complaint with the District Court below where the issue was "raised." In fact, the Eleventh Circuit stated that "[a] review of the record has not revealed a document labeled 'First Amended Complaint.'" (Pet. App. 9a) The *First* Amended Complaint that Clayton Hospitality referred to in its Initial Brief and filed in its Record Excerpt to the Eleventh Circuit is a different document from the Amended Complaint filed with the District Court. The

Amended Complaint contains forty-three (43) paragraphs and three (3) counts, whereas the *First* Amended Complaint contains forty-five (45) paragraphs and two (2) counts.

Respondents also vehemently disagree with Clayton Hospitality's claim regarding a so-called pattern of granting applications. (Pet. 2, n.5). The Eleventh Circuit held, "The Court's task, however, is to analyze the AEC transfer provision as it is written and not as the County could hypothetically enforce it. In a facial challenge, the facts of the challenging party's case are irrelevant." (Pet. App. 23a) Accordingly, such a claim by Clayton Hospitality is not only wrong, but should be disregarded.

Contrary to Clayton Hospitality's claim that the case was "dismissed," both the Eleventh Circuit and the District Court ruled in favor of the County and the Tax Collector and upheld the constitutionality of the license transfer provisions of the AEC.

Lastly, Clayton Hospitality claims that the Eleventh Circuit held below that "prompt access to the courts was sufficient to comply with *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]." (Pet. 3) Because the Eleventh Circuit recognized that the record did not reveal the version of the Complaint relied upon by Clayton Hospitality in its Initial Brief below, the Eleventh Circuit's brief reference to its *Boss Capital* decision in a footnote was dicta and fell short of an adjudication on the merits regarding the prompt judicial review issue. The Eleventh Circuit stated in that footnote:

> . . . . A review of the record has not revealed a document labeled "First Amended Complaint." Nevertheless, we have determined that "access to

> prompt judicial review [as opposed to prompt judicial resolution] is sufficient for adult entertainment licensing ordinances." *See Boss Capital, Inc. v. City of Casselberry*, 187 F. 3d 1251, 1256-57 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000).

Pet. App. 9a, n.3. Further, the Eleventh Circuit never cited to *Freedman v. Maryland*, 380 U.S. 51 (1965).

REASONS FOR DENYING THE WRIT

The Issue of "Prompt Judicial Review" was not Properly Preserved

The Amended Complaint served on the County and the Tax Collector did not specifically raise or preserve a constitutional challenge based upon the "prompt judicial review" issue. The Eleventh Circuit Court of Appeals specifically pointed out that the pleading relied upon by Clayton Hospitality, the *First* Amended Complaint, was not part of the record. Accordingly, as Respondents argued below, Clayton Hospitality should not be allowed to cure or attempt to cure deficient pleadings by filing amended pleadings with the Eleventh Circuit.

The AEC Assures "Prompt Judicial Review"

Section 3-10 of the AEC provides that "[a]ny decision of the tax collector . . . may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." (Pet. App. 27a) Clayton Hospitality expressly conceded below that, under controlling case law for the Eleventh Circuit, the AEC assures prompt judicial review.

The Eleventh Circuit held in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999) that "[w]e agree with the First, Fifth and Seventh Circuits and hold that prompt judicial review is sufficient for adult entertainment licensing ordinances." The judicial review provision in the Casselberry ordinance is similar to the AEC in that it allows any decision to be "immediately reviewed as a matter of right by the circuit court upon the filing of an appropriate pleading by an aggrieved party." *Id.* at 1259.

The cases relied upon by Clayton Hospitality are distinguishable. First, the issue here involves the provisions relating to the transfer of an existing adult entertainment license. In the instant case, the Diamond Club was open and operational before and throughout the subject litigation, and the record shows that Mr. Uranick, the President of Clayton Hospitality, had the right or authority to manage or control the day-to-day operation of the business, even before the license transfer application was approved.

Second, Section 3-10 of the AEC does not limit the review process to a particular pleading or forum. The applicant may file a complaint for injunctive and declaratory relief and may even immediately move for a preliminary injunction, as did Clayton Hospitality here. In summary, under Section 3-10 of the AEC, the aggrieved party has the right to decide what type of pleading(s) to file and what court to file the pleading(s) with. Section 3-10 does not limit his options in any way.

Other ordinances restrict the method of judicial review to a petition for writ of mandamus or a petition for writ of certiorari, and do not allow the aggrieved party to

file a complaint for injunctive relief. For example, the ordinance reviewed by the Ninth Circuit in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998), required review through a petition for a writ of mandamus. Similarly, the Memphis Ordinance reviewed by the Sixth Circuit in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 223 (6th Cir. 1995), provided for the appeal of adverse decisions by common law writ of certiorari. *See also, 11126 Baltimore Blvd. v. Prince George's County, Maryland*, 58 F.3d 988, 992 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 567 (1995) (although the code did not contain a provision for judicial review, Maryland law provided for judicial review of final administrative decisions).

Review through a petition for writ of mandamus or a petition for writ of certiorari is inherently different from a trial based upon a complaint for injunctive relief or a hearing on a motion for preliminary injunction. Respondents submit that the ordinances under review may be the root of the differences among the circuits.

Still other ordinances contained other constitutional defects. For example, the Littleton Ordinance reviewed in *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), had multiple problems including the failure to require a decision within a brief specified time frame. Unlike Littleton's licensing scheme, the AEC requires a decision within a brief specified time frame.

Nevertheless, Respondents submit that unlike the review required for censorship decisions under *Freedman*, "access to prompt judicial review is sufficient for licensing decisions." *Boss Capital*, 187 F.3d at 1256. As reasoned by the Eleventh Circuit in *Boss Capital*, citing *FW/PBS, Inc.*

v. City of Dallas, 110 S. Ct. 596 (1990), "[t]he dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license." *Id.* Therefore, the Eleventh Circuit held "[t]he need for a prompt judicial decision is therefore less compelling for licensing ordinances than for censorship schemes." *Id.* Hence, Respondents submit that the position of several of the Circuit Courts of Appeals, including the Eleventh Circuit, that "prompt judicial review" under the *FW/PBS* decision means prompt judicial *access*, not prompt judicial *resolution*, is the correct interpretation.

Furthermore, while local governments can certainly incorporate provisions into their adult entertainment ordinances assuring prompt judicial access, they cannot include provisions guaranteeing prompt judicial resolution. Only the reviewing court can ensure a prompt judicial resolution of a dispute.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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